(6)

No. 04-1131

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In the Supreme Court of the United States

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* (CSRA or Act), provides that "any collective bargaining agreement" between the government and employees' unions "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided that, with specified exceptions not implicated here, "the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

The questions presented are as follows:

1. Whether the 1994 technical amendment to 5 U.S.C. 7121(a)(1) implicitly authorized federal employees to sue in federal district court for employment grievances, despite the absence of an explicit judicial remedy for grievances in the CSRA and the comprehensive nature of the remedial system created by the Act.

2. Whether the CSRA precludes a federal employee from seeking equitable relief from a federal district court for an alleged constitutional violation by his or her employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 382 F.3d 938. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied a petition for rehearing on November 24, 2004 (Pet. App. 16a). The petition for a writ of certiorari was filed on February 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA or Act), Pub. L. No. 95-454, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985).

Under legislation enacted in 1995 and 1996, and amended in 2000, Congress revised federal personnel law as it applies to employees of the Federal Aviation Administration (FAA). Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, Tit. III, § 347, 109 Stat. 460 (repealed by Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, § 307(d), 114 Stat. 125); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, Tit. II, § 253, 110 Stat. 3237 (49 U.S.C. 40122); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, §§ 307(a), 308, 114 Stat. 124, 126 (49 U.S.C. 40122(g)). In those enactments, Congress made certain provisions of the CSRA applicable to FAA employees, but

exempted the agency from the remaining provisions. See 49 U.S.C. 40122(g)(2). In lieu of the inapplicable provisions of the CSRA, Congress directed the FAA to create a "personnel management system for the Administration that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency created the FAA Personnel Management System. See Federal Aviation Administration, U.S. Dep't of Transp., *FAA Personnel Management System* (Mar. 28, 1996), <http://www.faa.gov/ahr/policy/PMS/PMshom2.htm> (*FAA Pers. Mgmt. Sys.*).

The applicable provisions of the CSRA and the FAA Personnel Management System together comprise a personnel system that is as fully comprehensive as that created by the CSRA. Like the CSRA, the hybrid FAA personnel system is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

2. Chapter 71 of the CSRA, which governs the work-related grievances of federal employees, continues to apply to FAA personnel. 49 U.S.C. 40122(g)(2)(C). Under Chapter 71, federal employees may join unions to engage in collective bargaining, 5 U.S.C. 7101, 7102; management is obligated to engage in collective bargaining, 5 U.S.C. 7111, 7114(a)(1), 7117; and every collective bargaining agreement is required to contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1). However, a "collective bargaining agreement may exclude any matter from the

application of the grievance procedures."[1] 5 U.S.C. 7121(a)(2).

Any grievance that is subject to but not settled under the negotiated grievance procedures "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(1)(C)(iii). Either party may then challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7122(a), which may "take such action and make such recommendations concerning the [arbitral] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a)(2). The FLRA's decision regarding a challenge to an arbitration award is not subject to judicial review, unless the matter decided by the arbitrator involves an unfair labor practice. 5 U.S.C. 7123(a)(1). However, if the subject of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512 (discussed at p. 16, *infra*), the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the Merit Systems Protection Board.

The CSRA and the FAA Personnel Management System identify certain personnel actions as "prohibited personnel practice[s]." 5 U.S.C. 2302(a); *FAA Pers. Mgmt. Sys.* intro. § VIII. Both also identify certain adverse employment actions (actions taken because of unacceptable performance, suspensions or reductions in grade, etc.). 5 U.S.C. 4303, 7512; *FAA Pers. Mgmt. Sys.* ch. III § 3. The

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[1] In addition, the statute excludes from the grievance process specific categories of disputes, including prohibited political activities, retirement, life or health insurance, a suspension or removal for national security purposes, classification of positions that do not result in a reduction of grade, and examination, certification, or appointment. 5 U.S.C. 7121(c). Those exceptions are not relevant here.

CSRA's broad definition of "grievance" (incorporated into the FAA Personnel Management System by 49 U.S.C. 40122(g)(2)(C)) encompasses both prohibited personnel practices and adverse employment actions. See 5 U.S.C. 7103(a)(9)(A) and (a)(9)(C)(ii). Thus, an FAA employee covered by a collective bargaining agreement (CBA) can contest prohibited personnel practices and adverse actions through the grievance procedures established by the CBA.

The CSRA provides administrative remedies, in addition to the negotiated grievance procedure, for prohibited personnel practices involving discrimination on the basis of race, sex, religion, age, disability, and other protected grounds, and for certain adverse employment actions. See 5 U.S.C. 2302(b)(1), 4303, 7512. Before 1994, if a grievance was covered by both the negotiated grievance procedure and by other procedures, an employee was required to elect which of those procedures he wished to pursue. 5 U.S.C. 7121(d) and (e)(1) (1988). But if the grievance did not involve one of those specified prohibited personnel practices or adverse employment actions for which alternative remedies were preserved, and if the matter was not excluded from the grievance procedures under the CBA, Section 7121(a)(1) provided that the negotiated grievance "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988).

In 1994, Congress added a new subsection (g) to Section 7121, which expanded employees' available options by giving employees covered by a CBA a choice of alternative remedies for prohibited personnel practices not previously covered by subsection (d). Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under the 1994 amendment adding Section 7121(g), employees may challenge a personnel action under the negotiated grievance procedure, or

they may elect to pursue available administrative remedies through appeal to the Merit Systems Protection Board (MSPB), or by seeking corrective action from the Office of Special Counsel in the case of a prohibited personnel practice. 5 U.S.C. 7121(g). Thus, under current law, where a grievance is covered both by a collective bargaining agreement's negotiated grievance procedures and by other procedures under Section 7121(d), (e) or (g), an employee has a choice of administrative remedies. 5 U.S.C. 7121(d), (e)(1), (g)(2) and (3).

To accommodate the addition of Section 7121(g), Congress also made what it characterized as "Technical and Conforming Amendments" to Section 7121(a)(1), the provision that requires CBAs to have grievance procedures and in general renders those procedures exclusive. Act of Oct. 29, 1994, § 9(c), 108 Stat. 4366. The amendment made two revisions to the second sentence of Section 7121(a)(1): it added subsection (g) to its list of statutory exceptions to the provision making grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

5 U.S.C. 7121(a)(1). Section 7121(a)(2) provides that "[a]ny collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement."

3. Petitioner works for the FAA in Alaska as an Air Traffic Assistant. Pet. 2. As an FAA employee "whose duties include responsibility for safety-sensitive functions," petitioner is subject to random testing for illegal use of controlled substances. 49 U.S.C. 45102(b).

In June 2001, acting pro se, petitioner filed an unfair labor practice charge with the FLRA, alleging that the FAA had subjected him to a disproportionate number of drug and alcohol tests, Pet. App. 13a, and claiming that the FAA's drug and alcohol testing program "does not guarantee individual rights and the randomness of the selection process is suspect," *id.* at 3a. The FLRA denied petitioner's unfair labor practice charge, explaining that it did not fall within the FLRA's jurisdiction because the claim did not allege discrimination based on protected union activity. *Ibid.* The FLRA explained that, instead, petitioner's "recourse is through the grievance procedures of the negotiated agreement" between petitioner's union and the FAA. *Ibid.* (internal quotation marks omitted).

4. Petitioner did not initiate the grievance procedures of the collective bargaining agreement. Pet. App. 3a. Instead, petitioner, again acting pro se, filed suit in federal district court against the Department of Transportation, the parent agency of the FAA. *Ibid.* Petitioner's complaint alleged that the Department of Transportation had required him to take a disproportionate number of drug tests and the agency had thereby "violated Title 49 U.S.C. 5331(d)(8) [and 49 U.S.C. 45104(8)], which state[] that the Secretary of Transportation shall develop requirements that shall 'ensure that employees are selected by nondiscriminatory and impartial methods.'" C.A. Supp. E.R. 7-8.[2]

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[2] Section 5331(d)(8) of Title 49 provides that, in carrying out alcohol and drug testing programs, the Secretary of Transportation shall

Petitioner alleged that "[b]y [his] own informal methods," *id.* at 9, he had determined that he had been subjected to a higher number of drug and alcohol tests than other employees. *Ibid.* Petitioner sought injunctive relief, requesting the district court to require the FAA to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," *id.* at 11, and an order requiring the FAA to "remedy the situation" if the survey established that petitioner had not been tested randomly, by, for example, "enjoining the [FAA] from subjecting [petitioner] to any further substance-testing" until similarly situated employees had been tested as often as he. *Ibid.*

Petitioner later sought to amend his complaint. In his pro se motion to amend his complaint, petitioner alleged that on September 25, 2002, while he was at work, he had been required to submit to a substance-abuse test to "make up" a test that had been scheduled for August 28, 2002, which petitioner had missed. C.A. Supp. E.R. 25. Petitioner alleged that no provision of Title 49 of the United States Code authorized the FAA "to conduct a makeup test," *id.* at 28-29. Petitioner also alleged that "[t]he incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample." *Id.* at 31.

The district court dismissed petitioner's action for lack of subject matter jurisdiction. The court held that "federal

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prescribe regulations to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from employees in similar circumstances." A similar requirement is set forth in 49 U.S.C. 45104(8).

courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Pet. App. 3a (internal quotation marks omitted). The court concluded that petitioner's sole remedy was to submit his allegations pursuant to the CBA's procedures (which also provided for binding arbitration), and that his failure to do so precluded judicial review.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court noted that the FAA Personnel Management System, like the CSRA, "is 'an integrated scheme of administrative and judicial review,'" Pet. App. 4a (quoting *Fausto*, 484 U.S. at 445). The court explained that, although the FAA system generally does not give employees the right to seek review of personnel matters in district court in the first instance, it, like the CSRA, expressly preserves employees' rights under various anti-discrimination laws to sue in district court after exhaustion of administrative remedies. *Id.* at 4a-5a. The court further observed that the FAA Personnel Management System incorporates the CSRA provisions governing employee grievances, that Section 7121(a)(1) requires collective bargaining agreements to contain procedures for settling grievances, and that the collective bargaining agreement covering petitioner "provides a comprehensive administrative process for redress of his grievance concerning his drug and alcohol testing." *Id.* at 5a-6a.

The court of appeals then held that the FAA Personnel Management System provided that the grievance procedures created by the collective bargaining agreement were petitioner's sole remedy and precluded direct action in federal court. The court explained that the "well-established rule" is that, in light of the comprehensive remedial scheme provided in the CSRA, courts begin with the presumption that courts "have no power to review federal personnel de-

cisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Pet. App. 7a (internal quotation marks and citation omitted). Because Section 7121(a)(1) "does not expressly provide for federal court jurisdiction" over employment-related claims that fall within collective bargaining agreements, *ibid.*, the court of appeals concluded that federal courts lack authority to entertain such claims. The court acknowledged that the Federal Circuit and the Eleventh Circuit had concluded that the 1994 amendments to Section 7121(a)(1) authorized courts to review federal employee grievances. *Id.* at 6a-7a (citing *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003); *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002)). The court rejected that position, stating that those courts had concluded that the addition of the word "administrative" in 1994 *implicitly* authorized federal court jurisdiction over such claims, but in light of the comprehensiveness of the CSRA remedial scheme, that was an insufficient basis to support federal judicial review of employee grievances. *Id.* at 9a-10a.

Finally, the court of appeals rejected petitioner's contention that his grievance should be construed as a prohibited personnel practice and that the federal courts can review such claims. Assuming that his grievance could be construed in that way, the court of appeals held that petitioner was required under the CSRA to seek corrective action from the Office of Special Counsel, and that that exclusive administrative remedy "preclude[s] judicial review of [petitioner's] claimed 'prohibited personnel practice.'" Pet. App. 10a; see 49 U.S.C. 40122(g)(2)(H) (making CSRA provisions concerning Office of Special Counsel investigations of prohibited personnel practices applicable to the FAA).

DISCUSSION

Petitioner contends that this Court's review is warranted with respect to two issues. First, petitioner contends (Pet. 6-15) that review is warranted to resolve a conflict in the circuits about whether the 1994 amendment to Section 7121(a)(1) provides for judicial review of federal employees' grievances. Second, petitioner argues (Pet. 16-25) that the circuits are divided about whether the CSRA precludes courts from granting equitable relief for constitutional violations.

The court of appeals correctly held that the CSRA does not provide federal employees subject to the FAA Personnel Management System direct judicial review of work-related grievances. Nevertheless, we concur with petitioner that certiorari is warranted on the question whether the 1994 amendment to 5 U.S.C. 7121(a)(1) implicitly authorized judicial review of federal employee grievances. The Court should limit its review to that statutory question, however, because petitioner did not invoke the available grievance procedures before seeking to raise his constitutional claim, and because that constitutional claim is plainly insubstantial.

1. Petitioner contends (Pet. 12-15) that Section 7121(a)(1), as amended in 1994, should be construed to permit federal court review of employee grievances because the provision "does not preclude a federal employee's direct recourse to the federal courts." Pet. 12. According to petitioner, because a distinction is sometimes drawn "between the terms 'administrative' and 'judicial,'" Pet. 13, the 1994 amendment specifying that the grievance procedures provided by a CBA are the "exclusive *administrative* procedures" for certain employee grievances implies that *judicial* procedures are available to review employee griev-

ances. To hold otherwise, petitioner contends, would render the term "administrative" superfluous, contrary to the general rule "that [courts] must, if possible, construe a statute to give every word some operative effect." *Ibid.* (quoting *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004)). That argument lacks merit. The court of appeals correctly concluded that the 1994 technical and conforming amendment to Section 7121(a)(1) did not authorize judicial review of employee grievances that previously had been foreclosed.

The CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). On a number of occasions, this Court has considered whether federal employees may seek judicial review of work-related disputes where such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided by statute. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to enable a federal employee to sue an agency official for damages for alleged constitutional violations in employment. Despite the recognition in other contexts of a damages cause of action against federal officials for constitutional violations, the Court held that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal em-

ployment with a new judicial remedy. *Bush*, 462 U.S. at 368.[3]

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review" precluded federal employees from obtaining judicial review in a suit for back pay under the Tucker Act, 28 U.S.C. 1491, where the CSRA did not explicitly provide for that remedy. 484 U.S. at 445. Considering both the language and the structure of the CSRA, the Court held "that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. And in *Karahalios* v. *National Federation of Federal Employees*, 489 U.S. 527 (1989), the Court held that judicial enforcement of the duty of fair representation is barred, because the CSRA empowers the Federal Labor Relations Authority to enforce a union's statutory duty of fair representation and because "[t]here is no express suggestion in [the CSRA] that Congress intended to furnish a parallel remedy in a federal district court to enforce" the duty. *Id.* at 532.

As the court of appeals correctly concluded, Pet. App. 9a-10a, Congress's 1994 technical amendment to Section 7121(a)(1) did not *sub silentio* reverse longstanding law and create a new right to judicial review of federal employee grievances. Petitioner does not contend that the addition of the word "administrative" constitutes an express grant

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[3] Although *Bush* was decided after the enactment of the CSRA, it concerned the federal personnel system the CSRA replaced. This Court has cited *Bush* for the principle that a comprehensive personnel system precludes judicial remedies not provided for by the system. See *Karahalios* v. *National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989).

of a right of judicial review; rather he argues that the "add[ition] [of] the word 'administrative *strongly suggests*" that Congress intended to create a right of judicial review. Pet. 14 (emphasis added). But a "suggest[ion]" falls far short of what is required to create a right of judicial review to supplant the remedial system of the CSRA. This Court held twice prior to 1994 that "the CSRA's 'integrated scheme of administrative and judicial review' foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at 536 (quoting *Fausto*, 484 U.S. at 445). By 1994, it was also firmly established in the court of appeals that, in addressing employment-related claims of federal employees, courts would not infer a right to judicial review where none was *explicitly* provided by the comprehensive scheme of the CSRA. As petitioner concedes (Pet. 14), based on that principle, the courts of appeals uniformly had held before the 1994 amendment that the CSRA precludes judicial review of various statutory and non-statutory claims unless the Act expressly provided for such review.[4] There is thus

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[4] See, *e.g.*, *Berrios* v. *Department of the Army*, 884 F.2d 28, 31-32 (1st Cir. 1989) (state law tort claim); *O'Connell* v. *Hove*, 22 F.3d 463, 470-471 (2d Cir. 1994) (Fair Labor Standards Act (FLSA) overtime claim); *Pinar* v. *Dole*, 747 F.2d 899, 910-911 (4th Cir. 1984) (prohibited personnel practice), cert. denied, 471 U.S. 1016 (1985); *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991) (Federal Tort Claims Act (FTCA) claim); *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991) (claim under 42 U.S.C. 1985(1)); *Schrachta* v. *Curtis*, 752 F.2d 1257, 1259-1260 (7th Cir. 1985) (adverse personnel action); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984) (FTCA claim); *Rivera* v. *United States*, 924 F.2d 948, 951-952 (9th Cir. 1991) (FTCA claim); *Petrini* v. *Howard*, 918 F.2d 1482, 1484-1485 (10th Cir. 1990) (state law tort claim); *Broughton* v. *Courtney*, 861 F.2d 639, 644 (11th Cir. 1988) (state law tort claim); *National Treasury Employees Union* v. *Egger*, 783 F.2d 1114, 1117 (D.C. Cir. 1986) (prohibited personnel practice); *Carter* v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.) (FLSA overtime claim), cert. denied, 498 U.S. 811 (1990), superseded

no reason to believe that Congress would have thought in 1994 that the mere insertion of the word "administrative" in 5 U.S.C. 7121(a)(1) would suffice to create a new independent right to judicial review of matters subject to grievance procedures under a CBA.

Petitioner's reading of Section 7121(a)(1) is also contrary to the statutory scheme embodied in the CSRA. As discussed above, where an employee's position is covered by a CBA, the CSRA channels employee grievances through negotiated grievance procedures unless the subject matter of the grievance falls in an express statutory exception or has been specifically excluded from coverage by the CBA itself. If those procedures do not resolve the grievance, either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's decision by the FLRA, 5 U.S.C. 7122(a). That structure reflects "the Congressionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; accord *Fausto*, 484 U.S. at 449 (holding that judicial review outside the framework of the CSRA was incompatible with various "structural elements" of the CSRA, such as "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review").

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by statute as stated in *Mudge* v. *United States*, 308 F.3d 1220, 1227, 1230 (Fed. Cir. 2002) (holding that *Carter* was overruled by 1994 amendment).

That conclusion is reinforced by the fact that Congress expressly provided for a right of judicial review on the part of the employee in one specific situation in which a dispute has been submitted to grievance procedures under a CBA: if the matter involves an adverse employment action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 in the same manner and under the same conditions as if it had been rendered by the Merit Systems Protection Board. Congress's provision of an express right of judicial review for such matters underscores that review of grievances is precluded in other circumstances. See *Fausto*, 484 U.S. at 447-450; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Indeed, petitioner's construction of the amended Section 7121(a) produces an anomalous result that Congress should not lightly be deemed to have intended. Federal agencies have established their own grievance procedures for employees who are not covered by CBAs and therefore are not subject to the grievance procedures contained in such agreements. See 5 C.F.R. 771.201 (1994) (requiring establishment of grievance procedures).[5] The courts of appeals uniformly have held that the CSRA precludes employees subject to an agency's grievance procedures from bypassing those procedures and seeking judicial consideration of their grievances. See, *e.g.*, *Pinar* v. *Dole*, 774 F.2d 899, 905-907 (4th Cir. 1984), cert. denied, 471 U.S. 1016

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[5] The Office of Personnel Management rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. OPM, *Agency Administrative Grievance System*, 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 C.F.R. 771.101.

(1985); *Carducci* v. *Regan*, 714 F.2d 171, 172-175 (D.C. Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979, 982-983 (5th Cir. 1982); see also *Bobula* v. *DOJ*, 970 F.2d 854, 856, 858 (Fed. Cir. 1992) (refusing to enforce settlement agreement that resolved grievances asserted through agency's grievance procedures because CSRA does not authorize judicial enforcement of such settlement agreements). Under petitioner's interpretation of Section 7121 and the 1994 amendments, however, federal employees subject to a CBA may now avoid the grievance procedures established by the CBA and present their grievances directly to the courts without resort to any administrative procedures at all. But because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to pursuing their agencies' internal grievance procedures and would be precluded from obtaining judicial review. That preferential treatment of employees subject to CBAs makes little sense. Grievance procedures established by CBAs are the product of an agreement between a federal agency and a union, the federal employee's bargaining representative. There is no reason to believe that Congress intended to grant federal employees a right to bypass grievance procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while at the same time continuing to subject other federal employees to grievance procedures over which they had no say and continuing to foreclose judicial review for such employees except in cases of significant adverse employment actions covered by 5 U.S.C. 4303 or 7512 or cases involving alleged discrimination.

Petitioner's construction also is contrary to this Court's admonition that courts should be cautious about interpreting technical and conforming amendments to make sub-

stantive changes to the law where "there is no indication that Congress intended to change" the law. *Director of Rev.* v. *CoBank ACB*, 531 U.S. 316, 323 (2001). Conforming amendments are typically added for the sake of clarity and are not intended to change legal standards.[6] See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 428 (1984). Petitioner's reading "would mean that Congress made a radical—but entirely implicit—change" in the 1994 amendment. *CoBank*, 531 U.S. at 324. "[I]t would be surprising, indeed, if Congress" had done that "*sub silentio*." *Id.* at 323; see *Mudge* v. *United States*, 50 Fed. Cl. 500, 506 (2001) ("We find it inconceivable that Congress intended to alter this basic structural reform of the Civil Service Reform Act by a one-word change that was introduced as a technical amendment without discussion, explanation, or debate."), rev'd, 308 F.3d 1220 (Fed. Cir. 2002).

Petitioner errs in contending that reading the 1994 amendment *not* to create a judicial remedy would deprive the amended language of meaning. The conforming amendment that added "administrative" to Section 7121(a)(1) served to clarify the remedies available to federal employees for grievances. As explained above, the 1994 amendments added a new subsection (g) to Section 7121, which gave federal employees a choice of administrative remedies for grievances concerning prohibited personnel practices other than discriminatory personnel actions. Similarly, under subsections (d) and (e), federal employees have a choice of administrative remedies for addressing grievances relating to discriminatory personnel practices and adverse actions. The conforming amendment clarified and con-

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[6] Thus, the "presumption that statutes are usually enacted to change existing law," on which petitioner relies (Pet. 14) (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985), is not generally applicable to technical and conforming amendments.

firmed that, except for those three circumstances, the negotiated grievance procedures "shall be the exclusive administrative procedures" for federal employee grievances, 5 U.S.C. 7121(a)(1), and at the same time preserved judicial review of administrative decisions rendered under the other provisions that remain available to employees under subsections (d), (e) and (g). The reference to "exclusive administrative procedures" in Section 7121(a)(1) also confirms that under subsection (f), which provides that even where an employee *has* elected to pursue administrative grievance procedures, the employee retains a right of *judicial* review if the subject matter of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512.

2. As petitioner observes (Pet. 6-10), the courts of appeals have reached conflicting conclusions about whether the 1994 amendment to 49 U.S.C. 7121(a)(1) authorizes judicial review of federal employee grievances. The Federal Circuit held that the amendment implicitly reversed established law and authorizes judicial review of federal employee grievances. *Mudge* v. *United States*, 308 F.3d 1220, 1228-1230 (2002). The court concluded that because amended Section 7121(a)(1) "no longer restricts a federal employee's right to pursue an employment grievance in court," judicial review is now available. *Id.* at 1232. The court reasoned that because "administrative" is sometimes used to "distinguish from such [functions and acts] as are judicial," *id.* at 1228 (quoting *Black's Law Dictionary* 45 (6th ed. 1990), the provision stating that Section 7121(a)(1) limited only "the administrative resolution of a federal employee's grievances" implicitly placed no limitation on "an employee's right to seek a judicial remedy for such grievance." *Id.* at 1228. Although the Federal Circuit acknowledged Congress's "unambiguous and unmistakable preference f[or] exclusivity of arbitration," *id.* at 1231 (quoting

Muniz, 972 F.2d at 1309), it held that the "plain language" of amended Section 7121(a)(1) overrode "these policy concerns." *Mudge*, 308 F.3d at 1231-1232. In *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (2003), the Eleventh Circuit explicitly "adopt[ed] th[e] reasoning" of *Mudge* "on all * * * points," *id.* at 1241, "hold[ing] that Congress's addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated grievance procedures contained in [the] collective bargaining agreement." *Ibid.*

The Ninth Circuit correctly rejected that construction. Pet. App. 8a-9a. It concluded that "[t]he *Mudge/ASEDAC* implicit-authorization approach is inconsistent * * * with principles the Supreme Court has approved"—specifically, that in light of the integrated and comprehensive nature of CSRA, courts should not infer judicial remedies. *Id.* at 9a (citations omitted). The Ninth Circuit held that, consistent with the principles established in *Karahalios* and *Fausto*, courts should recognize a right of judicial review under a comprehensive scheme such as that created by the FAA Personnel Management System or the CSRA only where it is "express[ly] grant[ed]." *Id.* at 10a. There is thus a clear multi-circuit conflict on the proper analysis of the 1994 amendment to Section 7121(a)(1). Because all three courts have denied rehearing en banc on this issue, see Pet. App. 16a; 2/7/03 Order at 1, *Mudge* v. *United States*, *supra* (No. 02-5024); 8/19/03 Order at 1, *ASEDAC* v. *Panama Canal Comm'n*, *supra* (No. 02-13789), the conflict likely will persist absent this Court's intervention.

Moreover, this case implicates a recurring issue of considerable practical importance both to the Nation's largest employer and its employees. The rule adopted by the Fed-

eral Circuit and Eleventh Circuit could require the federal government to litigate employee grievances in federal court in the first instance, involving considerable delay and additional expense compared to the traditional—and congressionally preferred—remedy of addressing such claims through the negotiated grievance process, followed by the availability of binding arbitration. Because employment grievances of the sort governed by Section 7121(a)(1) are exceptionally common, the rule adopted by the Federal and Eleventh Circuits would create a significant litigation burden on the federal government. That approach also undermines the government's ability to seek to resolve complaints informally through the grievance process, undermines the role of the collective bargaining representative in resolving grievances, and undermines the advantages of arbitration in bringing about an expeditious and consistent resolution of disputes for the benefit of all employees in the workplace. The circuit conflict also creates an untenable lack of uniformity in federal employment law. Accordingly, this Court's review is warranted.

3. Petitioner contends (Pet. 21-25) that the CSRA should be construed to permit judicial review of a federal employee's grievances when the employee seeks equitable relief for an alleged constitutional violation. Petitioner contends (Pet. 21) that, because the CSRA precludes federal employees' suits for money damages for violation of a constitutional right, see *Bush* v. *Lucas*, 462 U.S. at 368, construing the statute to preclude judicial review of a constitutional claim for equitable relief would have "the effect of stripping *all* courts of jurisdiction to review" employment-related constitutional claims of federal employees. In petitioner's view, the CSRA should be construed to avoid the "serious constitutional question" that would be presented if "a federal statute were construed to deny any judicial

forum for a colorable constitutional claim." Pet. 25 (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)).[7] Petitioner also maintains (Pet. 16-21) that the courts of appeals are divided about whether the CSRA affords equitable remedies for constitutional violations. Review of this contention is not warranted at this time.

Petitioner is correct that the courts of appeals have reached different conclusions on the narrow question of the availability of equitable relief under the CSRA for employment-related injuries, including constitutional claims. The majority of the circuits that have addressed the question have held that the comprehensive nature of the CSRA precludes equitable remedies for employment-related injuries, just as it excludes other forms of judicial relief not expressly provided by the statute. See *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Lombardi* v. *SBA*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Berrios* v. *Department of the Army*, 884 F.2d 28, 31 (1st Cir. 1989); *Hallock* v. *Mo-*

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[7] A related issue has been raised by another petition now pending before the Court. The petition filed in *Dotson* v. *Griesa*, No. 04-1276 (Mar. 22, 2005), presents two issues. The first is whether a Judicial Branch employee who is an "excepted employee" under the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 111, is precluded from seeking equitable relief in a lawsuit challenging the termination of his employment on constitutional grounds. The petition also presents the question whether a cause of action for damages should be inferred under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against federal District Court judges and other judicial personnel in the employment context. The government's brief in opposition in that case takes the position that the petition for a writ of certiorari should be denied on both issues. To the extent that the Court is inclined to consider the availability of injunctive relief for constitutional claims otherwise subject to the CSRA's comprehensive remedial system, this case provides the better vehicle because it does not involve the special considerations implicated by the Article III setting of *Dotson*.

ses, 731 F.2d 754, 757 (11th Cir. 1984); see also *Pinar*, 747 F.2d at 909-912 (holding that CSRA precludes equitable relief, at least where constitutional injury is not major). The Third Circuit, by contrast, has held that the CSRA does not prevent a federal employee from seeking equitable relief for a constitutional employment claim. *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995). The District of Columbia Circuit has held that equitable relief is available for federal employees asserting constitutional claims, but it generally requires exhaustion of administrative remedies as a prerequisite to bringing suit. See *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (1990) ("Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court.").

Nevertheless, review of this contention is not warranted. Petitioner failed to make use of the comprehensive scheme of administrative relief afforded to him by the FAA and CSRA. The rule is well established that where "a constitutional claim is intertwined with a statutory one," and "machinery" exists "for the resolution of the latter, a plaintiff must first pursue the administrative machinery." *Steadman*, 918 F.2d at 967. That principle applies even when the administrative process could not even resolve the constitutional claim, as long as the claim could be considered later upon judicial review. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994). The process of "[p]roceeding through the agency in this way provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529

U.S. 1, 24 (2000).[8] It also affords responsible decision-makers an opportunity to address the matter in the first instance and grant relief on non-constitutional grounds, perhaps informed by principles of constitutional avoidance, thereby obviating any occasion for addressing a constitutional claim in court.

As noted above, petitioner could have sought to resolve his claims through the grievance procedure negotiated by the FAA and petitioner's union. See *National Agreement Between the Nat'l Ass'n of Gov't Employees and the FAA* art. 13 (May 26, 1998).[9] If that procedure did not resolve petitioner's various grievances, his union could have invoked binding arbitration. See *id.* art. 14; 5 U.S.C. 7121(b)(1)(C)(iii) (requiring CBAs to contain provisions for binding arbitration). And petitioner's union could have sought review of the arbitrator's decision from the FLRA. 5 U.S.C. 7122. To the extent that petitioner alleged a prohibited personnel practice (Pet. 15 n.6; Pet. App. 10a), he had a choice of either seeking corrective action from the Office of Special Counsel (5 U.S.C. 1211-1218; 49 U.S.C. 40122(g)(2)(H)), or pursuing a grievance and seeking equitable relief, if necessary, from the arbitrator (5 U.S.C. 7121(b)(2)(A)(i) (authorizing arbitrator to stay personnel

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[8] Accord *Sturm, Ruger & Co.* v. *Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002); *Association of Civilian Technicians, Tony Kempenich Mem'l Chapter 21* v. *FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001).

[9] The CBA that covered petitioner at all times relevant to this litigation is *available at* http://www.faa.gov/ahr/policy/agree/agrees/term/nage/nage.cfm.

actions)).[10] See 5 U.S.C. 7121(g) (requiring election of remedies).

If at the conclusion of the administrative process petitioner were dissatisfied with the result, and if he believed a constitutional issue remained, he could have brought a suit at *that* time arguing that the court should consider his constitutional claim. At that point, the court could have the benefit of a final decision on all of petitioner's claims after full administrative process, the asserted constitutional claim would be brought more sharply into focus, and arguments concerning judicial review could address not only whether equitable relief is available at all, but also in what forum such relief might be sought, cf. *American Fed'n of Gov't Employees* v. *Loy*, 367 F.3d 932, 936-937 (D.C. Cir. 2004), what the conditions for obtaining any such relief might be, and the nature and scope of judicial review if it might be available in certain circumstances. This case, by contrast, comes to the Court presenting the issue of the availability of judicial review for constitutional claims in the

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[10] Petitioner contends (Pet. 15 n.6) that the court of appeals erred in holding that petitioner could seek corrective action from the Office of Special Counsel for prohibited personnel practices. He notes that the prohibited personnel practices provisions of Title 5 do not generally apply to FAA employees and that OSC's web site indicates that it only has jurisdiction over complaints of FAA employees alleging retaliation for whistleblowing. Petitioner's contention is mistaken. 49 U.S.C. 40122(g)(2)(H) makes applicable to the FAA 5 U.S.C. 1214, which directs the Special Counsel to "receive any allegation of a prohibited personnel practice and [to] investigate the allegation." 5 U.S.C. 1214(a)(1)(A). Although the FAA is not subject to the prohibited personnel practices listed in the CSRA at 5 U.S.C. 2302(a), the FAA Personnel Management System has its own list of prohibited personnel practices, which are a subset of those contained in the CSRA, *FAA Pers. Mgmt. Sys.* intro. § VIII. 49 U.S.C. 40122(g)(2)(H) thus authorizes the Special Counsel to investigate allegations by FAA employees of prohibited personnel practices.

abstract. Even if the issue otherwise might warrant certiorari at some point, the Court should await a case in which the applicable administrative procedures have been invoked and there is a final decision under those procedures.[11]

Review also is not warranted because the constitutional claim petitioner actually asserted in this case is insubstantial. Even construing petitioner's pro se complaint and motion to amend his complaint liberally, see *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam), the only constitutional claim petitioner has raised is that the FAA violated a right to privacy he asserts under the First Amendment by subjecting him to a make-up drug urinalysis test at work on September 25, 2002, which he claimed was the equivalent of an involuntary test performed at his home outside of working hours. C.A. Supp. E.R. 31 ("The incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample."). There is no

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[11] To be sure, petitioner no more exhausted his statutory claims than his constitutional ones. Nonetheless, the failure to exhaust his constitutional claims counsels against plenary review for two reasons, neither of which applies to the statutory claims. First, to the extent that petitioner suggests (for the first time in this Court) that constitutional avoidance principles require greater review of constitutional claims, similar considerations might have informed the nature of the bypassed administrative review or the extent of judicial review after administrative remedies were exhausted. Neither of those issues—which could inform the availability of *de novo* judicial review in district court—has been explored in this case. Second, in light of the failure to exhaust, petitioner would not be entitled to relief even if the Court adopted the D.C. Circuit's variant of the rule petitioner seeks. See p. 23, *supra* (discussing *Steadman*). With respect to the statutory question, by contrast, it does not appear that the courts of appeals have focused on the need to exhaust.

basis for a First Amendment claim in those circumstances. The complaint does *not* contend that the alleged lack of randomness in testing or any other aspects of the testing program generally violated the Fourth Amendment or petitioner's constitutional rights to equal protection or due process of law.

Moreover, petitioner has presented no argument in any of his filings in the courts below, nor pointed to any facts in the record, to suggest how the make-up test could have violated his privacy rights. See Pet. C.A. Br. 19 (simply asserting that test violated his "First Amendment right to privacy"); *id.* at 22; see also Plaintiff's Opp. to Def. Mot. to Dismiss 7-8. This Court has made clear that "the expectations of privacy of * * * employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety," *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 626-627 (1989), and has held that breath, blood, and urine testing for drug use does not impermissibly interfere with railroad employees' Fourth Amendment privacy interests. *Ibid.* Petitioner does not contest that air travel, like railroad transportation, is heavily regulated to ensure safety, nor does he contest that, as an Air Traffic Assistant, petitioner is an employee "whose duties include responsibility for safety-sensitive functions." 49 U.S.C. 45102(b). In light of petitioner's diminished expectation of privacy, he has pointed to nothing to suggest that subjecting him to a make-up urinalysis test at work violated his privacy interests. Such an insubstantial claim would not even implicate the concerns petitioner presents that a "'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum *for a colorable constitutional claim*.'" Pet. 25 (quoting *Webster* v. *Doe*, 486 U.S. at 603) (emphasis added).

For the foregoing reasons, this case does not present a suitable vehicle for considering whether judicial review might be available in some circumstances in some forum to obtain equitable relief for an alleged constitutional violation where judicial review is not otherwise provided under the comprehensive regime of the CSRA itself.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented by the petition.

Respectfully submitted.

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JUNE 2005